

AMENDMENTS TO THE DRAWING FIGURES

Please replace originally-filed drawing sheet 1/5, which includes FIG. 1 and FIG. 2, with the enclosed REPLACEMENT DRAWING SHEET 1/5, which includes an amended FIG. 2.

REMARKS

Claims 1-15 are pending in this application. Claims 16-21 are withdrawn from consideration, as being directed to non-elected subject matter, in response to the restriction requirement mailed September 1, 2006.

Paragraph [0019] on page 4 of the specification has been amended to state that the straw (designated in FIGS. 1, 2, 4, and 10 with reference numeral 141) may be attached to the exterior of the pouch, as shown in amended FIG. 2, and adapted for detachment by the consumer. Support for the amendments to this paragraph and drawing figure is found in paragraph [0021] on page 5 of the specification as originally filed: "Straw 141 may be attached to the exterior of the pouch . . . and adapted for detachment by the consumer."

Claim 9 has been amended to recite "welded" side edges, as described, for example, in paragraph [0019] on page 4 of the specification as originally filed: "The side edges . . . are welded together . . ."

Claim 13 has been amended to clarify that the pierceable barrier seal (that covers the opening through which the fitment extends, see independent claim 9) is sealed to a welding flange extending laterally from the top of the fitment. Support is found, for example, in paragraphs [0024] and [0025] on page 7 of the specification as originally filed: "A tubular opening 161 through fitment 160 . . . A welding flange 173 extends laterally from the top of the fitment 160. The flange is covered with a pierceable seal 171, preferably of a barrier material . . ." See also FIGS. 10 and 11.

The specification and drawing amendments add no new matter.

Drawing Objections

The Office Action objects to the drawings as not showing the “detachable straw attached to said container,” as recited in claims 1 and 9.

As requested, Applicant has amended FIG. 2 to specifically show this feature, as described in the originally filed specification.

Reconsideration and withdrawal of the drawing objections are respectfully requested.

The Rejections under 35 U.S.C. § 112, 2nd Paragraph

Claim 9 and its dependent claims have been rejected as not previously setting forth welding of the side edges, “in order to warrant the language ‘bottom edges that are welded in the same manner as said side edges,’” as recited in claim 9. In response, Applicant has amended claim 9 to now recite “welded side edges,” preceding the above-quoted phrase in claim 9.

Claim 13 has been rejected because the phrase “said weld flange” lacks antecedence. In response, Applicant has amended this claim to recite “a welding flange” instead of “said weld flange” and also to clarify that (i) the welding flange “extend[s] laterally from the top of said fitment” and (ii) the pierceable barrier seal covers the opening (through which the fitment extends, see base claim 9).

In view of these amendments, reconsideration and withdrawal of the rejections under 35 U.S.C. § 112, 2nd paragraph, are respectfully requested.

The Rejections under 35 U.S.C. § 103

A. THE CLAIMED INVENTION

Independent claim 1 is directed to a container for fluid comprising first and second flexible panels that are sealed along their first and second side edges. A fitment is sealed between third edges of the panels, intermediate the side edges, and has an opening covered by a frangible element that may be pierced to access the fluid. Also, independent claim 9 is directed to a pouch for a non-carbonated beverage. The pouch comprises a flexible body with welded side edges and an opening. A fitment extends through the opening, is sealed to the body, and has a surface covered by a frangible material that may be pierced to access the beverage.

Independent claims 1 and 9 additionally recite that the container (or pouch) is formed either (1) from a unitary sheet of material or (2) from separate sheets having bottom edges that are welded in the same manner as the side edges. The independent claims further recite that the container (or pouch) comprises a detachable straw. Dependent claims 2-8 and 10-15 recite additional features directed to the materials used for the frangible element and panels, and structural characteristics of the container.

Applicant's invention therefore resides in a combination of features which provides a simple and flexible package for beverages and other fluid materials with a pierceable sealing element that is easy to locate and pierce with a straw or other tube. See paragraphs [0005] and [0006] on pages 2 and 3 of the specification. For the detailed reasons given below, this claimed combination of features is nowhere described or suggested in the references cited in the Office Action, namely (1) Lawrie *et al.* (U.S. Patent Application Publication No. 2003/0128900; "Lawrie"), (2) Hardy *et al.* (U.K. Patent Application GB 2 111 944 A; "Hardy"), (3) Frisk (U.S. Patent No. 6,265,038; "Frisk"), (4) Herbert (U.S. Patent No. 4,561,110; "Herbert"), (5) Gilford

(U.S. Patent No. 3,647,386; “Gilford”), (6) Bell (U.S. Patent No. 5,971,613; “Bell”), (7) Anderson (U.S. Patent No. 6,595,391; “Anderson”), and Davis *et al.* (U.S. Patent No. 4,445,550; “Davis”).

**B. THE COMBINATION OF LAWRIE, HARDY, AND FRISK DOES NOT
SUGGEST THE FEATURES OF INDEPENDENT CLAIMS 1 AND 9**

The Office Action makes the following rejections of claims 1-10 and 13 under 35 U.S.C. § 103(a), over the combination of Lawrie and Hardy.

- Claims 1-5, 7-10, and 13 as obvious over Lawrie in view of Hardy, and
- Claim 6 as obvious over Lawrie and Hardy, further in view of Frisk, U.S. Patent No. 6,265,038 (“Frisk”).

Applicant respectfully traverses these rejections.

To establish a *prima facie* case of obviousness, the prior art reference (or references when combined) must teach or suggest all the claim limitations. *In re Royka*, 490 F.2d 981, 985, 180 U.S.P.Q. 580, 583 (C.C.P.A. 1974) (emphasis added). The combination of the Lawrie and Hardy references, whether or not further combined with Frisk, does not meet the legal standard for obviousness. This is because none of Lawrie, Hardy, and Frisk suggest a fitment that is sealed to a container body (or between flexible container panels) and has an opening covered by a pierceable frangible element, as required in independent claims 1 and 9.

Lawrie, describes a container in the form of a pouch and having a column that is formed from sealing two panels together and a piercing point separating the exterior and interior of the container. See, for example, paragraphs [0024] and [0026]. Lawrie does not describe a fitment with an opening covered by a pierceable barrier seal, as acknowledged at the top of page 4 of the Office Action.

Likewise, the structure 214 and corresponding description on page 3, lines 82-87 of Hardy, cited in the Office Action, similarly does not disclose a fitment with an opening covered by a pierceable frangible element. Hardy refers to this structure of the bag as an “insert” and repeatedly states that this “insert” is capable of re-sealing or self-sealing after puncture with a needle and withdrawal of the needle:

The insert preferably has a core adapted to be easily punctured by an injection needle but to seal closely around the needle and to re-seal the puncture after withdrawal of the needle.

Page 1, lines 65-69.

“. . . elongate insert . . . capable of self-sealing a puncture made transversely through the insert . . .”

Page 1, line129 to page 2, line 2.

The insert may be . . . adapted to be easily punctured by an injection needle but to seal closely around the needle and to re-seal the puncture after withdrawal of the needle . . .

Page 2, lines 110-114.

The “insert” described in Hardy and cited in the Office Action is therefore clearly different from the claimed fitment having an opening covered by a frangible element that may be pierced. The insert, unlike the claimed fitment, has no opening that is covered by a pierceable frangible element. Instead, the insert is filled with a core (*e.g.*, an elastomer or foamed polyolefin). See, page 1, liens 72-73 and page 2, lines 116-117. The core material provides the needed capability of re-sealing the insert after puncture with a needle.

Similarly, the “inward extensions” 19 shown in Figure 1 of Hardy are different from the claimed fitment sealed to the container body. These inward extensions are formed from the peripheral seal around the bag, to define a passage into the bag. As such, the “inward extensions” described in Hardy are essentially the same as the “column,” as discussed above

with respect to Lawrie, that is formed from sealing two panels together. Neither of these structures is the same as the claimed fitment, which is sealed to a container body and has an opening covered by a pierceable frangible element. Finally, Frisk also fails to describe this claimed element. Instead of using a fitment with a pierceable barrier seal, Frisk describes accessing the container contents with a “spout portion” which can be broken or twisted. See col. 6, lines 54-65.

None of the references Lawrie, Hardy, or Frisk suggests a fitment that is sealed to a container body (or between flexible container panels) and has an opening covered by a pierceable frangible element, as recited in independent claims 1 and 9. For at least this reason, the combination of these references does not render claims 1 and 9, or their dependent claims 2-8, 10, and 13, *prima facie* obvious under 35 U.S.C. § 103. Reconsideration and withdrawal of the rejections of claims 1-10 and 13 over Lawrie, Hardy, and Frisk are respectfully requested.

C. THE COMBINATION OF HERBERT AND GILFORD DOES NOT
SUGGEST THE FEATURES OF INDEPENDENT CLAIM 9

The Office Action additionally rejects claims 9-13 and 15 under 35 U.S.C. § 103(a), as obvious over the combination of Herbert and Gilford. Applicant respectfully traverses these rejections.

As noted above, *prima facie* obviousness requires that the prior art references teach or suggest all the claim limitations. *In re Royka*, 490 F.2d 981, 985, 180 U.S.P.Q. 580, 583 (C.C.P.A. 1974) (emphasis added). The combination of Herbert and Gilford does not meet this legal standard. In particular, these references do not suggest “a detachable straw attached to said container.” Nor do these references suggest “a fitment extending through said [pouch] opening and sealed to said [pouch] body, said fitment having a surface covered by a frangible material” as recited in independent claim 9.

First of all, as the Office Action acknowledges on page 6, Herbert does not disclose a straw that is attached to the container. Gilford does not remedy this deficiency, since Gilford also fails to suggest this claimed feature. Guilford instead describes

suitable containers for receiving . . . lengths of capillary tubing with their entrained liquids directly from the cutting machine or other apparatus. One would bring the container under the apparatus and have the length fall into the container as it is cut or broken from a larger length.

Col. 2, lines 54-58.

Likewise,

A suitable apparatus which cuts and separates the small section 52 from a larger length of capillary tubing can then drop the small length of tubing into the cavity by gravity. It is assumed that the length of tubing 52 will have a concentrate of some fluid, such as for example whole blood, entrained therein . . .

Col. 6, lines 1-6.

Gilford therefore clearly contemplates receiving short capillary tubing lengths after longer lengths are first (i) filled with fluid samples from a patient and then (ii) cut into short lengths with a cutting apparatus. In view of this description, it would make no sense to provide the containers described in Gilford with attached, capillary tubing (which the Office Action equates with the claimed “straw”). The filling of this tubing with sample fluid and cutting of the tubing into shorter lengths are conducted in completely separate operations and/or with separate equipment.

Accordingly, while Gilford discusses possible ways of manufacturing and supplying the containers (e.g., in a flat or collapsed state), Gilford does not suggest providing these containers with the capillary tubing attached. See col. 8, lines 64-75. Moreover, merely “receiving” or “inserting” this tubing into the “elongate cavity or chamber 48,” as described, for example at col.

5, lines 65-72, does not amount to “attaching” this tubing to the container to provide a “detachable straw attached to said container,” as claimed.

Moreover, neither of the Herbert of Gilford references suggests another claimed element, namely a fitment that extends through the container opening, is sealed to the container body, and has a surface covered by a frangible material. The disclosure of Herbert is directed to a bag which may be sterilized at a temperature of at least 100°C for medical purposes, such as the storage of blood or drugs for injection. See the abstract and column 3, lines 11-14. “The bag has two outlet openings 16 and 18, that in each case are fitted with a hose connector or connection head . . . 20 . . . and 22.” See col. 9, lines 26-29. These “hose connectors” or “connection heads” described in Herbert, however, do not have “a surface covered by a frangible material” as required in claim 9. Herbert instead specifically teaches the placement of “diaphragm 42” within the hose connectors, and not on the surface. According to Herbert, a “ring-like bead 44” is required near the surface of the hose connector “opening 40,” in order to “press against the point [of an infusion apparatus] before piercing the diaphragm 42.” See col. 10, lines 45-46 (emphasis added). The positioning of the “ring-like bead 44” between the opening at the surface of the hose connector and the diaphragm

. . . is necessary to have a seal between the point part of the infusion apparatus and the wall of the hose as otherwise there would be a danger of the liquid running out freely.

Col. 10, lines 40-43.

Herbert therefore describes and illustrates a diaphragm that does not cover a surface, but is instead placed within a hose connector and separated from the opening by a ring-like bead to prevent leakage. See also FIG. 3 and equivalent discussion, at col. 11, lines 12-13, with respect to the connectors shown in FIG. 4 and 5. The use of the “ring-like bead” close to the surface of

the hose connectors and pierceable diaphragm within the hose connectors, is for the stated purpose of preventing leakage from the bag, when hanging upside down in normal use. See col. 10, lines 39-40. Modification of the bag disclosed in Herbert to include the claimed fitment, having its surface covered by a frangible material, would in fact defeat the purpose of the ring-like bead, taught in Herbert to prevent leakage.

Other elements described in Herbert, such as stoppers 23 and 26, are not sealed to the body of the bag, as required of the fitment recited in claim 9. These separate structures, unlike the claimed fitment, are instead “jammed in position” by force “into the connectors 20 and 22.” See col. 9, lines 62-65.

Gilford, like Herbert, is also directed to containers for medical and biological fluids. See col. 1, lines 47-52. Gilford similarly describes accessing fluids stored in such containers through a pierceable element or “plug 76,” which is located inside an opening, and not covering its surface. In fact, this plug is specifically described and illustrated as separating a “first passageway 58,” which leads to the interior of the container, from a “second passageway 68,” which leads to an opening or “flared pilot entrance 70” of the container. A “hollow riser 72” extends between the second passageway 68 and the entrance 70. See col. 6, lines 30-38 and FIG. 3.

Thus, both Herbert and Gilford are concerned with using pierceable elements within an opening to maintain a separate, sterile environment on one side of the opening. Neither of these references, however, suggests a fitment that is sealed to the container body and has a “surface covered by a frangible material” as recited in independent claim 9. Additionally, for detailed reasons given above, Neither Herbert nor Gilford suggests “a detachable straw attached to said container,” which is another element recited in this claim. For at least these two reasons, the

combination of Herbert and Gilford does not render claim 9 obvious. Dependent claims 10-13 and 15 recite additional elements and are therefore patentable for at least the same reasons that claim 9 is patentable. Reconsideration and withdrawal of the rejections of claims 10-13 and 15 over Herbert and Gilford are respectfully requested.

D. THE PROPOSED MODIFICATION OF THE BELL, ANDERSON, OR
DAVIS REFERENCES (TO INCLUDE THE FEATURES OF LAWRIE)
WOULD BE INCONSISTENT WITH THEIR STATED PURPOSE

The Office Action makes the following rejections of claims 1-3 and 7-15 under 35 U.S.C. § 103(a):

- Claims 1, 2, 7, 8-11, 13, and 14 as obvious over Bell, Anderson, and Lawrie, and
- Claims 3, 12, and 15 as obvious over Bell, Anderson, and Lawrie, further in view of Davis

Applicant respectfully traverses these rejections.

A *prima facie* case of obviousness requires “some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings.” See M.P.E.P. § 2143. The Supreme Court has further clarified that the motivation to combine references need not be found explicitly, but may instead be implicit, in the prior art. *KSR, Int’l v. Teleflex, Inc.*, 127 S.Ct. 1727, 1743 (2007) (quoting *Alza Corp. v. Mylan Labs., Inc.*, 464 F.3d 1286, 1291, 80 USPQ2d 1001, 1003 (Fed. Cir. 2006)).

However, if a proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir. 1984). In view of these legal standards, there would have been no motivation to combine any of the references

Bell, Anderson, or Davis, with Lawrie as proposed in the Office Action. That is because the use a straw, disclosed in Lawrie, with any of the containers described in Bell, Anderson, or Davis, would render these containers unsatisfactory for their intended purpose.

The disclosure of Bell is directed to a bag container which utilizes a non-linear edge seal, allowing the bag to stand upright when filled. Bell, Abstract. For accessing contents within the bag, Bell describes a spout, pour nozzle, or other type of “closure arrangement for selective opening and reclosing.” See col. 4, lines 20-21; col. 7, lines 36-38; and col. 8, lines 49-50. The use of a detachable straw for breaking a frangible element, according to the claimed container (or pouch), would therefore be **clearly unsatisfactory for Bell's stated purpose** of selectively opening and reclosing the bag. A detachable straw is also unsuitable for accessing soap, shampoo, lotion, or “particulates such as coffee beans and ground, grass seed, fertilizer, candies, salt grains and pellets,” as described in Bell. See col. 3, lines 63-67.

For these reasons, Applicant respectfully disagrees with the Office Action's position on Page 7 that “it would have been obvious . . . to provide the container of Bell with the detachable straw of Lawrie . . .” In fact, this proposed modification of Bell is directly at odds with the intended purpose of containers disclosed in Bell.

Likewise, access or consumption of container contents, using a detachable straw, would render the containers described in Anderson and Davis unsuitable for their intended purpose of maintaining completely sterile conditions during both filling and withdrawal of these contents. See Anderson, for example, at col. 4, lines 18-35 and 53-56 and col. 5, lines 26-30. Also, Davis requires maintaining a completely aseptic environment, and in particular one in which the tube that projects into the container “is never exposed to an unsterile environment.” See, for example,

col. 3, lines 50-53. A detachable straw attached to the container would be inconsistent with this objective.

Finally, with respect to rejections of claims 3, 12, and 15, Applicant respectfully notes that the materials described in Davis are **not** for the same intended use as the materials used for the recited, pierceable barrier seal. Disc 28 is not a pierceable barrier, but instead a closure or lid that is heat sealed onto a bag after it is filled. See col. 6, lines 54-57. Rather than being pierceable, this disc or lid is meant to provide a complete and effective seal. See col. 3, lines 54-61. The skilled artisan would therefore clearly not select the same materials, described in the art as useful for lid closures, for a pierceable barrier seal.

For the above reasons, the modification of Bell, Anderson, and/or Davis to include a detachable straw for accessing the container contents, as proposed in the Office Action, would render these containers unsatisfactory for their intended purposes. Consequently, there would have been no motivation to make such a modification, under Federal Circuit precedent. The combination of Bell, Anderson, Davis, and Lawrie does not render claims 1-3 and 7-15 *prima facie* obvious. Reconsideration and withdrawal of the rejections under 35 U.S.C. § 103 over these references are respectfully requested.

CONCLUSION

In view of the above amendments and remarks, all pending claims of this application are believed to be in condition for allowance. Acknowledgement of the same is respectfully requested.

This response is believed to completely address all of the substantive issues raised in the Office Action dated October 12, 2007.

Respectfully submitted,
BANNER & WITCOFF, LTD.

Date: January 14, 2008

By: /Benjamin C. Spehlmann/
Benjamin C. Spehlmann
Registration No. 45,649

Customer No. 22907

Enclosure: REPLACEMENT DRAWING SHEET 1/5